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IN THE

Supreme Court of the United States

October Term, 1964.

No. 258

ALBERT STRITE and COMMONWEALTH TRUST COMPANY OF PITTSBURGH, Executors of the Estate of Lillian D. Cree, deceased,

Petitioners,

v.

EDGAR A. McGINNES, District Director of Internal Revenue,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AS OF NO. 14,461.

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v.

EDGAR A. McGINNES, District Director of Internal Revenue,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AS OF NO. 14,461.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Albert Strite and Commonwealth Trust Company of Pittsburgh, Executors of the Estate of Lillian D. Cree, deceased, respectfully represents:

REPORTS OF COURTS BELOW.

The opinion of the Court of Appeals for the Third Circuit is reported: *Strite v. McGinnes*, 330 F. 2d 234. It is printed in this petition (p. 12).

The opinion of the District Court is reported: *Strite v. McGinnes*, 215 F. Supp. 513. It is printed in the record (18a to 31a).

JURISDICTIONAL GROUNDS.

(i) On March 31, 1964, the United States Court of Appeals for the Third Circuit entered judgment affirming the judgment of the District Court.

(ii) On April 23, 1964, the Court of Appeals entered an order denying a petition for rehearing.

(iii) The jurisdiction of your Honorable Court is invoked under the Act of June 25, 948, Chapter 646, 62 Stat. 928 (28 U. S. C. 1254).

QUESTIONS PRESENTED.[1]

I. Unless the Internal Revenue Code specifically so provides, as it does with Section 2038, is property held in a fiduciary capacity property of a decedent?

II. Is ownership by a decedent of a general power of appointment exercisable in his favor, or in favor of his estate or the creditors of his estate, a prerequisite under Section 2041 of the Internal Revenue Code?

III. Is Section 2041 expressed in plain and compelling language of sufficient clarity to be understood by an ordinarily intelligent taxpayer?

IV. If harmony between sections is a desirable objective, should it not be sought between Section 2041, including general powers of appointment in a decedent's gross estate, and Section 2056, allowing deductions of general powers of appointment to a surviving spouse?

STATUTE INVOLVED.

The statute involved is the *Internal Revenue Code of 1954*, Section 2041 (26 U. S. C. 2041), the pertinent text of which reads:

"(a) * * * The value of the gross estate shall include the value of all property * * *."

* * * * * * * *

"(2) * * * To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment * * *."

"(b) * * *

(1) * * * The term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate;

"except that ——

"(A) A power to consume, invade or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment."

STATEMENT OF THE CASE.

The executors of the estate of Lillian D. Cree brought this civil action for refund of estate taxes paid to the defendant, the District Director of Internal Revenue. Both plaintiffs and the defendant filed motions for summary judgment. The District Court entered judgment for the defendant, and the Court of Appeals affirmed. The plaintiffs' motion was denied.

Lillian D. Cree was the last survivor of three unmarried sisters. The Internal Revenue Service added the residuary trust of sister Mary's estate, $53,957.16, and the residuary estate of sister Katherine, $84,593.41, to the estate of Lillian, $121,863.79; and assessed a deficiency in estate tax of $36,842.39, which, after protest and conferences, was paid with interest.

In 1939 the three sisters executed identical wills. Each will gave life estates to the other two sisters and the survivor of them, and directed the trustees on the death of the survivor "To divide the entire remainder and residue of my property into as many equal parts or shares as there may be nieces and nephews. . . ."[1] After this complete disposition of property, the wills provided:

> "It is my desire that my sisters enjoy the benefit of my property to as full an extent as they may require. If, therefore, in the sole judgment of my Trustees hereinafter named it is at any time necessary or advisable in order to provide for the reasonable needs and proper expenses or the benefit or comfort of my sisters or the survivor of them, I authorize, empower and direct them to sell any or all of the said residue of

[1] Each sister had six siblings.

my property as they may think proper and pay over to my sisters or to my surviving sister the proceeds or any part thereof as if it were income."

As to the trust under Mary's will, the Commonwealth Trust Company of Pittsburgh was co-trustee with the surviving sister, Lillian, at the time of Lillian's death. The trust under Katherine's will as such never came into existence, her estate still being in the process of administration by Lillian, her executor. The plaintiffs completed the administration.

The Internal Revenue Service held that the above provision permitting invasion of principal in the sole judgment of the trustees was a general power of appointment under Section 2041 of the Internal Revenue Code. The Courts agreed.

It never became necessary or advisable to use principal.

Jurisdiction of Court of First Instance.

Plaintiffs duly filed a formal claim for refund with the defendant, to whom the deficiency assessed was paid; and when the claim was rejected, entered suit in the District Court for the Eastern District of Pennsylvania as provided by Title 28 U. S. C. Section 1346, and Sections 6532 and 7422 of the Internal Revenue Code.

ARGUMENT.

Reasons for Granting Writ.

1. There are innumerable wills by which a husband leaves his estate or his life insurance in trust for his widow for life, remainder to his children, and gives his trustees discretionary power to use principal for his widow in the event of contingencies and emergencies. No marital deduction is allowed for such a trust; nevertheless, under the ruling of the Courts below, it would again be fully taxable in the estate of the widow.

Often the trustee *is the widow alone*, sometimes jointly with a "non adverse" corporate trustee.

2. Countless other wills create two trusts, one a marital deduction trust over which the widow has a general power of appointment; the other a residuary trust with discretionary powers of invasion for the widow if necessary or advisable.

Under the decision of the Courts below, *both* trusts would be taxable in the estate of the widow.

No **"ascertainable** standard" beyond fiduciary good faith can be devised for an unknown necessity.

Senate Finance Committee Report.[2]

That the "legislative purpose" was *not* to tax fiduciary powers is plain from the two *opening paragraphs* of the Senate Finance Committee Report:

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[2] U. S. C. Congressional and Adm. Ser., 82 Cong. 1 Sess. page 1530.

> "This bill simplifies sections 811 (f) and 1000 (c) of the Internal Revenue Code, relating to estate and gift tax on powers of appointment.
>
> "The present law taxes all powers to appoint, whether exercised or not, except two specified classes of powers. One of these exempts powers to appoint to certain near relatives. The other is *intended to exempt fiduciary powers but has proved inadequate* for the purpose." (Emphasis supplied.)

Again, in discussing the specific provisions of the "Powers of Appointment Act of 1951" (the genesis of the present Section 2041) and its provision eliminating tax evasion by "successive powers of appointment," the Report says:

> "The existing statute contains a provision which was intended to cover this situation, but it is too broadly worded. Under it, for example, the exercise of an otherwise exempt power *might be* taxed if it were exercised *by giving a trustee discretionary power to invade principal.*" (Emphasis supplied.)

So it is obvious that Congress never intended to tax a trustee's "discretionary power to invade principal". If Congress had intended to do so, it would have said so, *as it did in Section 2038,* taxing (to the estate of a donor) transfers with power retained to alter, amend or revoke "in whatever capacity exercisable".

The "average lawyer" referred to in the Committee Report is guided in preparing wills by the standard form books edited by experts. None of the forms for fiduciary invasion of principal contain an "ascertainable" standard. For examples, see the forms suggested by the *American*

Law Institute,[3] the preface of which says "written for the general practitioner but will also be useful to the lawyer experienced in these matters." *Murphy's Will Clauses*, distributed nationwide by the Matthew Bender Company; *Page on Wills*—no comment is needed here; the *Practicing Law Institute*—its monograph on "Drawing Wills" uses only the word "benefit" in limiting the trustee, and recommends such clause for many reasons, mainly that "future developments cannot be foreseen".

The meaning of Section 2041.

It is reasonable to assume that Congress knew the definition of a "general power of appointment". It is "* * * a power to appoint to anyone whom the donee may select, * * *": *Scott on Trusts*, Sec. 17.2. It is the equivalent of a "fee simple title": *Phinney v. Kay*, 275 F. 2d 776, 780 (5 Cir. 1960); *subject to an excise on transfer.*

What Congress is saying in Section 2041 is that when in her own right (and not as a fiduciary) a decedent has what we lawyers call a general power of appointment, and that, even if the instrument gives her such power on its face, if, later in the instrument (or by operation of law) the general power is cut down by an ascertainable standard, then, notwithstanding the earlier words, she does *not* have a general power. An illustration of the restriction of a seeming general power by operation of law is *Commissioner of Internal Revenue v. Ellis Estate*, 252 F. 2d 109 (3 Cir. 1958), where a marital deduction was denied because the widow's power to consume was limited by "good faith", *even though the*

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[3] "To promote the clarification and simplification of the law and its better adaptation to social needs."

will said that "she and she alone shall be the judge of how much shall be required".

When Congress said "except", they meant "to leave out *or take out*": *Webster's New World Dictionary*, College Ed. (c. 1960). To "take out" implies first of all that that which is taken out is already in. You cannot take out something which is not in there in the first place.

The clarity of the statute.

You have held that taxing statutes "require plain and compelling language": *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 347, 348; *May v. Heiner*, 281 U. S. 238, 244. See also *Helvering v. Rebsamen Motors, Inc.*, 128 F. 2d 584. Sec. 2041 is a **taxing** section and not a **deduction** section—which is a "matter of legislative grace, . . .": *Henslee v. Union Planters Nat. Bank & Tr. Co.*, 335 U. S. 595. Section 2041 was called a strange "converse proposition" in *Snyder v. U. S.*, 203 F. Supp. 195; and in the case at bar the District Court said: "The Regulations, which seek to illustrate the requirements, do not attain much clarification, * * *": *Strite v. McGinnes*, 215 F. Supp. 513, 514. The Court of Appeals did not discuss this problem. On behalf of all the "average lawyers" we ask that certiorari be granted and the problem resolved.

The "unwary"[4] trapped by this decision will be the $25/$50,000 a year executive (or judge) who leaves $200/$500,000 to a life insurance trust with fiduciary powers of invasion for his widow. The multimillionaire advised by estate planners is not unwary. I am informed the Service is now taxing estates with a sole corporate trustee.[5]

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[4] Senate Finance Committee Report.

[5] By Stephen Nash, Esq., Oliver Bldg., Pittsburgh, Pa.

CONCLUSION.

The taxation of a fiduciary power as property of the fiduciary in her own right is not only contrary to the express intention of Congress, but it is an incongruous absurdity:

"Top is bottom,
Black is white,
Far is near
And day is night."
Reuben Lucius Goldberg.

And a fiduciary's discretion to be exercised only if necessary or advisable is a general power of appointment: *Third Circuit Court of Appeals.*

The property of Mary and Katherine was never the property of Lillian, and there was no legal reason why Mary and Katherine should not make Lillian co-trustee of their property. Lillian never breached her fiduciary duties. Principal was never used.[6]

Because this decision affects so many wills in all the states, certiorari should be granted.

Respectfully submitted,

HENRY D. O'CONNOR,
Attorney for Petitioners.

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[6] There is no case in Pennsylvania where a Court has **actually permitted** expenditures from principal to be made other than for support and maintenance, not even to defend a life tenant under indictment for murder (and ultimate death sentence): **Ballem's Estate**, 15 D. & C. 2d 79 (1956).

OPINION OF THE COURT.

(Filed March 31, 1964.)

By McLAUGHLIN, Circuit Judge.

This is an action by the executors of the estate of Lillian D. Cree for the refund of certain estate taxes paid.

Lillian Cree was one of three sisters who, in 1939, executed identical wills. Each sister in her will established a trust of the residue of her estate, the net income from which was to be paid for life to the other two sisters and their survivor, and thereafter to a brother for life. On the death of the surviving sisters and brother, each trust estate was to be divided among the testatrix's nephews and nieces and their issue.

Under each testamentary trust, the other sisters were named as trustees, and given the power to appoint the principal if in their judgment it was "at any time necessary or advisable in order to provide for the reasonable needs and proper expenses or the benefit or comfort" of the other two sisters, i.e., themselves.[1]

As it happened, brother James died in 1941; sister Mary, in 1950; and sister Katherine, in 1953. Sister Lillian thus became the sole beneficiary of the net income and trustee

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[1] The section of the will in question is as follows:

"It is my desire that my sisters enjoy the benefit of my property to as full an extent as they may require. If, therefore, in the sole judgment of the trustees hereinafter named, it is at any time necessary or advisable in order to provide for the reasonable needs and proper expenses or the benefit or comfort of my sisters or the survivor of them, I authorize, empower, and direct them to sell any or all of the said residue of my property as they may think proper and pay over to my sisters, or to my surviving sister, the proceeds or any part thereof as if it were income."

of the trusts established by Mary and Katherine. When Katherine died in 1953, Lillian appointed the Commonwealth Trust Company as co-trustee of the trust established under the will of Mary.[2] Lillian died in 1956 before Katherine's estate was completely administered and the trust under Katherine's will as such apparently never came into existence.

The Internal Revenue Service and the District Court below held that Lillian had a general power of appointment over the trusts of Mary and Katherine, because the powers of Lillian to invade were not limited by an ascertainable standard relating to health, education, support or maintenance in accordance with §2041(b)(1)(A) of the Internal Revenue Code, and that the property subject to the power was includible in Lillian Cree's gross estate.

The posture of the case as developed by the taxpayer and the government requires an examination of sections 2041 and 2055. Both deal in part with "ascertainable standards" and powers to invade trust principal. The taxpayer regards §2055 standards as inapplicable. The Government contends they are "analogous".

Section 2041 taxes property subject to powers of appointment possessed by a decedent at his death. Under this section, a general power of appointment is defined as a power which is exercisable in favor of the decedent, his estate, his creditors or the creditors of his estate. 26 U. S. C. 2041 (b)(1). The estate tax consequence to a decedent who possessed such a power (if created after October 21, 1942, which is the situation before us) is that property subject to the power will be included in the decedent's gross estate.

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[2] Katherine had been co-trustee with Lillian, under the trust established by Mary. Mary's will, as did all their wills, provided for the discretionary appointment of the Commonwealth Trust Company by the surviving sister.

whether or not the power was exercised. However, the statute provides that a power to consume, invade or appropriate property for the benefit of the decedent which is limited by "an ascertainable standard relating to the health, education, support or maintenance of the decedent shall not be deemed a general power of appointment", with the taxable result that the property subject to that limited power will not be included in the decedent's gross estate. 26 U. S. C. 2041(b)(1)(A).

On the other hand §2055 deals with deductions for charitable transfers.[3] The scope of this section is developed by the Internal Revenue Regulations. In part the present Regulation 20.2055-2 provides that "[i]f a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is *presently ascertainable*, and, hence, severable from the noncharitable interest." (Emphasis supplied.)

Commenting on this section, in force at least since 1934 (Treasury Regulations 80 (1934 Ed.) Art. 44), the Supreme Court said:

> "Although Congress, in permitting estate tax deductions for charitable bequests, used the language of outright transfer, it apparently envisaged deductions in some circumstances where contingencies, not resolved at the testator's death, create the possibility that only a calculable portion of the bequest may reach ultimately its charitable destination. * * * The limit of permissible contingencies has been blocked out in a

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[3] Section 2055 provides: "* * * [T]he value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers * * * to [certain public or charitable uses]". 26 U. S. C. 2055 (1958).

> more convenient administrative form in Treasury Regulations which provide that, where a trust is created for both charitable and private purposes the charitable bequest, to be deductible, must have, at the testator's death, a value 'presently ascertainable and hence, severable from the interest in favor of the private use', and further, to the extent that there is a power in a private donee or trustee to divert the property from the charity, 'deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.'" Merchants Bank v. Commissioner, 320 U. S. 256 (1943) at pp. 259-260.

The Court went on to say that these regulations were an appropriate implementation of the Code Section and, "having been in effect, under successive reenactments of that provision, define the framework of the inquiry in cases of this sort."

Thus it is said that the private interest must be limited by an ascertainable standard in order that the amount entitled to a charitable deduction, might be determined. "Only where the conditions on which the extent of invasion of the corpus depends, are fixed by reference to some readily ascertainable and reliably predictable facts, do the amount which will be diverted from the charity and the present value of the bequest become adequately measurable." Merchants National Bank, supra, at p. 261.

Therefore, while §2055 deals with the apportionment between private and charitable calculable interests in a grant, §2041 is an all-or-nothing proposition, i.e., whether the property, subject to the power, is to be included in the decedent's gross estate or not.

Unlike §2055 and its predecessors, §2041(b)(1)(A) is

a relatively recent addition to the Code.[4] It came by way of the Power of Appointment Act of 1951 which amended the 1939 Code. Act of June 28, 1951, c. 165, 65 Stat. 91. The regulations promulgated by the Service implementing this section appear to spring from a position taken by the Service that §2055 "ascertainable standards" were the same as those under §2041.[5] There are no reported Congressional hearings on the Act, which we have been able to uncover,

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[4] Only a few reported cases have dealt with §2041(b)(1)(A). Phinney v. Kay, 275 F. 2d 776 (5 Cir. 1960); Barrett v. Tomlinson, 129 F. Supp. 642 (S. D. Fla. 1955); Snyder v. United States, 203 F. Supp. 195 (W. D. Ky. 1962); Pittsfield National Bank v. United States, 181 F. Supp. 851 (D. Mass. 1930).

[5] On July 14, 1954, the Internal Revenue Service promulgated regulations implementing the 1939 Code, as amended by the Power of Appointment Act. In part they provided: "whether a power is limited by an ascertainable standard will be determined by applying the principles followed in ascertaining the extent to which, if any, a bequest to a trust for both private and charitable purposes is allowable as a deduction under—812(d) (now 2055). A power to consume, invade or appropriate property for comfort, pleasure, desire or happiness, is not a power limited by an ascertainable standard." Reg. 81.24 in force January 1, 1955 under 1939 Code. See 19 F. R. 4302, 4303, July 14, 1954. Thus these regulations were promulgated less than 5 weeks before the 1954 Code became law on August 16, 1954 (although a notice of proposed rule making was published on August 5, 1953. See 18 F. R. 4599). At least from January 1, 1959, the Internal Revenue Service in their promulgated regulations omitted this reference to §2055 and its predecessor. But the substance of §2055 remained in the regulation. "A power is limited by such a standard if the extent of the holder's duty to exercise and not to exercise the power is reasonably measurable in terms of his needs for health, education or support (or any combination of them)." The examples of what the Service believes are and are not ascertainable standards, as described in the regulations, seem to have been derivd from judicial decisions in §2055 cases. See Henslee v. Union Planters, 335 U. S. 595, 598 (1949); Merchants Bank v. Commissioner, 320 U. S. 256, 261 (1943); Ithaca Trust Co. v. United States, 279 U. S. 151, 154 (1929); Newton Trust Co. v. Commissioner, 160 F. 2d 175 (1 Cir. 1947). The latter case is very reminiscent of regulations respecting §2041. See Regulations 20.2041-1 (1959-1963).

The impression persists that the Internal Revenue Service regarded the standard of §2055, well settled by 1954, coextensive with the ascertainable standard of §2041.

and it may very well be true, that the Service, aiding in the drafting of the Act, intended that the ascertainable standard of §2055 be drawn into §2041. The fact that the term "ascertainable standard" was used by the late Judge Mahoney in Newton Trust Co. v. Commissioner, 160 F. 2d 175 (1 Cir. 1947), to describe the admeasurement required in the §2055 problem before him is weight for the proposition that the content and the meaning of that term was adopted by the legislators, when they adopted that term in enacting §2041.[6]

However, in the Senate and House Reports on the Power of Appointment Act, it was said:

> "Section 811(f)(3) (now §2041(b)(1)(A)) of the bill contains the definition of a general power of appointment. This definition applies to both preexisting and future powers * * *.
>
> "The definition provides that, if certain limitations or restrictions are present, a power is not a general power even though exercisable by the decedent in his own favor. A power to consume principal which is limited by an ascertainable standard relating to the holder's health, education, support or maintenance is not considered a general power * * *." House Report No. 327, Part 1, P. 5, April 17, 1951, 82 Cong. 1 Sess.; Senate Report, No. 382, P. 5, June 4, 1951, 82 Cong. 1 Sess.

With this meager background of legislative purpose, it is a fair construction of this section that the measure of

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[6] Further it would seem that since §2041 and §2055 will be applied to the same trust agreement they should be harmonious. Section 2055 taxes the estate of the settler of the trust. Section 2041 taxes the estate of him who was given the power to invade. It would seem incongruous that one year would find a certain portion of the settler's trust deductible because destined for a charitable purpose, and another year find that same property swept into the estate of the holder of a power when his estate is taxed under §2041.

control over the property by virtue of the grant of power is the determinant of the taxability of property subject to the power. See Morgan v. Commissioner, 309 U. S. 78 (1940). Unquestionably if the exercise of the power is restricted by definite bounds, relating to health, support, maintenance and education, even though the amount of property or funds that would be absorbed in its exercise was not measurable or predictable, it would not be a general power of appointment with the resulting tax consequence. The thin line drawn here is that while under §2041 it is required that the exercise of the power be restricted, under §2055, it is required that the property which can be appropriated under the power be measurable.

As we indicated above, we believe that the thrust of §2055 and the regulations promulgated under *that* section (which now have the force of law. Helvering v. Winmill, 305 U. S. 79, 83 (1938), Taft v. Commissioner, 304 U. S. 351 (1938)) is measurement and apportionment of funds or property destined for both charitable and private donees. Measurement is not a real issue in §2041. The extent of property subject to the power is almost always clear, but in deciding the taxability of the property, the query in §2041 will be the extent of the power. If the power is deemed a general one, all the property subject to the power is taxable. If the power is limited under §2041, the property subject to the power will not be includible in decedent's gross estate.[7]

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[7] This would not bring incongruous application of §2055 and §2041 to a given trust disposition. (See footnote 6.) If the property subject to the power was measurable under §2055, and the power to invade related to specified matters of §2041, there would be harmonious application.

However, a gap in the statute apparently remains where one has a limited power to appropriate to himself in matters other than his own health, education, maintenance and support, but where the property subject to the power is measurable for purposes of §2055.

Therefore, resolving this §2041 question, we are reluctant to look to the §2055 ascertainable standards recognized by the courts, as determinative. Nor will we rely on the §2041 Treasury Regulations. (See note 5.) We look rather to the grant of power given to the decedent and determine whether it is clearly limited in its exercise to matters relating to health, education, support and maintenance. The initial step is to determine in light of local law, the interest conveyed to the decedent under this trust, i.e., the extent to which, consonant with the testamentary trust provision, the decedent could invade and consume the principal. Morgan v. Commissioner, 309 U. S. 78 (1940); Commissioner of Internal Revenue v. Ellis' Estate, 252 F. 2d 109, 113 (3 Cir. 1958); Hoffman v. McGinnes, 277 F. 2d 598, 602 (3 Cir. 1960).

The trust language provides for invasion when in the judgment of the trustees "it is at any time necessary or advisable in order to provide for the reasonable needs and proper expenses or the benefit or comfort" of my sister.[8] Prefatory to this provision, the testator indicated that: "It is my desire that my sisters enjoy the benefit of my property to as full an extent as they may require."

In Pennsylvania, the cardinal rule of construction is that the actual intent of the testator must prevail when it can be ascertained from the language of the will. Anderson's Estate, 243 Pa. 34, 89 Atl. 306 (1914); In re Keefer's Estate, 353 Pa. 281, 45 A. 2d 31, 165 A. L. R. 1277 (1946). See Hoffman v. McGinnes, 277 F. 2d 598 (3 Cir. 1960). This intention is to be discovered from a consideration of all the language in the four corners of the instrument, giving the

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[8] It is to be noted that the conditions for the exercise of the power are in the disjunctive, i.e., "necessary or advisable * * * reasonable needs and proper expenses or the benefit or comfort * * *," so that if it was advisable to provide for the comfort of the sisters, an invasion of the corpus was permissible under the grant. (Emphasis supplied.)

words he employs their plain and ordinary meaning, except where the context in which they are used renders them a different denotation, or where legal or technical words are used and it is clear from their use that the legal or technical meaning was intended. Hoffman v. McGinnes, 277 F. 2d 598 (3 Cir. 1960); Longs Estate, 270 Pa. 480, 113 Atl. 675 (1921); Metzgar's Estate, 395 Pa. 322, 148 A. 2d 895 (1959); Collins Estate, 393 Pa. 195, 142 A. 2d 178 (1958); Wright Estate, 380 Pa. 106, 110 A. 2d 198 (1955); Schellentrager v. Tradesmens National Bank & Trust Co., 370 Pa. 501, 88 A. 2d 773 (1952). "Comfort", as considered in Zumbro v. Zumbro, 69 Pa. Super. 600, 603 (1918), embraces "a variety of things. It is not limited solely to the necessaries of life, but may include things which bring ease, contentment or enjoyment." It is something more than support, a "minimum endurable standard of living". Price v. Rothensies, 67 F. Supp. 591, 595 (E. D. Pa. 1946). "'[S]upport' is defined by Worcester as, 'Sustenance; maintenance; subsistence; sustentation; livelihood; living.' * * * '[B]enefit' is a much broader word than 'support' and has no such limited meaning as the latter word. It is thus defined in Worcester, 'advantage; gain; profit'; and its manifest signification is anything that works to the advantage or gain of the recipient." Winthrop Company v. Clinton, 196 Pa. 472, 477, 46 Atl. 435 (1900). See Helvering v. Evans, 126 F. 2d 270 (3 Cir. 1942). In the context of the present grant, we agree with Judge Freedman who held below at p. 517 that--

> "The will emphatically reveals that the sisters are intended to be the main objects of the testatrix's bounty. This is heightened threefold by the identical provisions which each sister made in her will. Were we now construing this will in the lifetime of a surviving sister, it is difficult to believe that a Pennsylvania

> Court would place any grudging limitation on the breadth of the power to consume. The power conferred on the decedent to invade principal for her 'benefit or comfort' must therefore be given its broadest meaning. It is not a power limited to her support but on the contrary, is to be used for her benefit or comfort." Strite v. McGinnes, 215 F. Supp. 513, at p. 517 (E. D. Pa. 1963).

We think that the breadth of power given the decedent to appropriate the trust principal to herself was not clearly limited or restricted to matters relating to the decedent's health, maintenance, support or education. While it is true that the words "necessary or advisable" limit the invasion and that benefit is itself somewhat limited when contrasted with an absolute power to appropriate property to oneself, the disjunctive character of the grant indicates that the decedent could invade the principal for her "benefit" whether or not it related to the matters specified in the statute. As we interpret the statute, "comfort" is a closer case but because she could have invaded the principal for her "benefit", we need not decide whether "comfort" is sufficient limitation on the breadth of a grant of power of appointment, so as to fall within the exception of §2041(b)(1)(A).

The taxpayer, however, relies heavily on In Re Watson's Estate, 241 Pa. 271, 88 Atl. 433 (1913), in which the residue of Watson's estate was left for his wife's sole use, benefit, and support during her natural life, remainder to heirs of his deceased brothers and sisters. The court there held that the wife could not invade for the use of her relatives, that the intention of the testator, as in Tyson's Estate, 191 Pa. 218, 43 Atl. 131 (1899), was to give the wife only so much, that she was not to use it to other purposes than her own support. The court said that beneficiary-wife had to show good faith, that she was a quasi-trustee for the re-

maindermen and could not destroy their interest. The court did not determine the bounds of her power, only that under the trust she could not invade the trust principal and give it to others. The sense of the decision is not as the taxpayer contends that "use, benefit and support" equals support.

Nor is the fact that holders of Powers of Appointment are limited by the standard of good faith in Pennsylvania sufficient to constitute an ascertainable standard. The search of §2041 is the breadth of power given a decedent. When that is determined, the tax consequence follows. Good faith exercise of a power is not determinative of its breadth.

Finally the taxpayer contends that Lillian Cree did not have a general Power of Appointment over the corpora of her sisters' trusts because she held that power as trustee. We believe, under the facts here, that it is the possession of the power of appointment over property that governs the tax consequences. Hurd v. Commissioner, 160 F. 2d 610, 613 (1 Cir. 1947). Welsh v. Terhune, 126 F. 2d 695 (1 Cir. 1942). That Lillian Cree was sole trustee under Katherine's will, and co-trustee with the Commonwealth Trust Company (a non-adverse trustee) under Mary's will, does not affect the taxability of whatever power she had to appropriate property to herself.

The judgment of the District Court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

ORDER.

To eliminate any possible confusion in the first sentence of footnote 6, second line thereof, page 6 of the slip opinion filed March 31, 1964, the word "taxes" is stricken and in its place and stead is inserted the language "deals with the taxation of".

The petition for rehearing in this appeal is denied.

By the Court,

McLAUGHLIN,
Circuit Judge.

Dated April 23, 1964.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 258

ALBERT STRITE AND COMMONWEALTH TRUST COMPANY OF PITTSBURGH, EXECUTORS OF THE ESTATE OF LILLIAN D. CREE, DECEASED, PETITIONERS

v.

EDWARD A. MCGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

At the date of her death, Lillian D. Cree was the income beneficiary and trustee[1] of two trusts established by her sisters. As trustee, she was empowered to distribute principal to herself whenever she determined it "necessary or advisable in order to provide for the reasonable needs and proper expenses or the benefit or comfort" of herself. Both courts below held that the corpus of the trusts was includible in the decedent's gross estate under § 2041 of the Internal Revenue Code of 1954 as property over which she had a general power of appointment.

[1] A corporate fiduciary was co-trustee of one of the trusts.

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The decedent's power was admittedly a "general" one (being exercisable in favor of herself, § 2041(b)(1)) unless it came within the express statutory exception for powers of invasion "limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent" (§ 2041(b)(1)(A)). The decision below that a power to appoint property for one's "benefit" or "comfort" is not limited by an ascertainable standard is correct, is required by the regulations,[2] and is supported by the uniform course of decisions.[3]

Petitioners' contention that the statute does not apply to powers held as a trustee is equally unsupportable. The statute defines a general power of appointment simply as a power to appoint property to one's self, and the capacity or manner in which it is exercisable—so long as it is not limited by an ascertainable standard—is irrelevant. See *Hurd* v. *Commissioner*, 160 F. 2d 610, 613 (C.A. 1st); *Welch* v. *Terhune*, 126 F. 2d 695, 697 (C.A. 1st),

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[2] Treas. Regs. on Estate Tax (1954 Code), § 20.2041-1(c)(2): "A power to use property for the comfort, welfare, or happiness of the holder of the power is not limited by the requisite standard."

[3] See *Merchants Bank* v. *Commissioner*, 320 U. S. 256, 261; *Henslee* v. *Union Planters Bank*, 335 U.S. 595, 598; *Helvering* v. *Evans*, 126 F. 2d 270, 272 (C.A. 3d), certiorari denied, 317 U.S. 638; *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175, 177 (C.A. 1st); *Price* v. *Rothensies*, 67 F. Supp. 591, 593 (E.D. Pa.) That such a provision imposes little effective limitation on the power of invasion is confirmed by State court decisions. See *Saurmann's Estate*, 39 Pa. D. & C. 629, 631; *Zumbro* v. *Zumbro*, 69 Pa. Super. Ct. 600, 603; *Rumsey's Estate*, 287 Pa. 448, 452; *Winthrop Co.* v. *Clinton*, 196 Pa. 472, 477.

certiorari denied, 317 U.S. 644; Rev. Rul. 55–518, 1955–2 Cum. Bull. 384.

There is in any event no conflict of decisions or other reason for review by this Court. The petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
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AUGUST 1964.

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IN THE

Supreme Court of the United States

October Term, 1964.

No. 258.

ALBERT STRITE and COMMONWEALTH TRUST COMPANY OF PITTSBURGH, Executors of the Estate of Lillian D. Cree, deceased,

Petitioners,

v.

EDGAR A. McGINNES, District Director of Internal Revenue,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit as of No. 14,461.

Reply Brief for Petitioners

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

The thrust of this "concise argument" is to the *reasons* for allowance of certiorari. May I quote from a few letters I have received:

"Dechert, Price & Rhoads (Philadelphia)

* * * * *

"I am very much interested in the *Strite* case and also in the point which is being raised by the estate tax examiners in Pittsburgh. I have discussed these questions with other lawyers in this office and plan to discuss them in the lectures on Powers of Appointment which I shall give for the Practicing Law Institute in New York on July 9 and August 6.

* * * * *

"George Craven"

"Foosaner, Saiber and Schlesinger (Newark)

* * * * *

"In lecturing before the Practising Law Institute in New York, I took occasion to refer to your case and the significance of its implication to some one hundred attorneys, trust officers, accountants and life underwriters in attendance.

* * * * *

"S. J. Foosaner."

"Lofit Publications, Inc.

* * * * *

"The concept of 'ascertainable standards' arises under a number of sections of the Internal Revenue Code and an authoritative analysis by the Supreme Court of the

inter-relationship of such sections would certainly be most helpful to the practising lawyer.

* * * * *

"J. Mertens."

"Homer I. Harris (New York)

* * * * *

"I have heard of no cases in New York in which the Service has taken the position that a power of invasion in a non-beneficiary trustee would result in the inclusion of the property in the beneficiary's estate. If it should be so held, it would *wreak havoc with invasion provisions generally.* (Emphasis supplied.)

* * * * *

"Homer I. Harris"

"Dear Mr. Harris:

"* * * I think that the *Strite* case is the cloud the size of a man's hand. To me, an 'ascertainable' standard is one which permits an actuarial computation; important for a charitable remainder under Section 2055, but having no bearing on the transfer of a property right—subject to an excise.

"The tax has been assessed and collected (by compromise) in Pittsburgh where there was a sole corporate trustee with discretionary powers because of this lack of an 'ascertainable' standard on the principle of law set forth in *Scott on Trusts*, (2nd Ed.), Section 187 et seq.

'Where the trustee refuses to act, the court may compel him to act:' 187.1.

'Although undoubtedly the trustee has considerable discretion in determining what is necessary for the beneficiary's support, there are limits to his dis-

cretion. It is true that the standard is not a fixed standard, but the trustee is guilty of an abuse of discretion if it appears to the court that he is paying less than a reasonable person could think necessary for the beneficiary's support.' 187.2 page 1386.

* * * * *

"Henry D. O'Connor"

The two cases cited by the respondent *actually support the petitioners* because they arise under what is now *Section 2038*, i.e., transfers of property by a decedent with the right retained by the decedent to alter, amend, or revoke; and in that section Congress has specifically provided that such right so retained "in whatever capacity exercisable" subjects the property transferred to the estate tax.

The property of Mary and Katherine was never the property of Lillian, no more than my property is my wife's property—perhaps even less so.

In *Hurd v. Commissioner*, 160 F. 2d 610 (C. A. 1st), the decedent transferred property to himself and his wife as trustees, and it was held that he retained the right to alter, amend, or revoke; in *Welch v. Terhune*, 126 F. 2d 695 (C. A. 1st), settlor transferred property to himself, his son, and his son-in-law, as trustees, the settlor to "be the active trustee," and here too it was held that he retained the right to alter, amend, or revoke because the Code makes such transferred property part of his estate if the settlor retains such right "*in whatever capacity exercisable.*" (Emphasis supplied by C. A. 1st.)

There is no such provision in Section 2041.

" 'Of all the exploits of Equity, the largest and the most important is the invention and development of the Trust.' So Professor Maitland was accustomed to tell his students.

* * * * *

"The trust, however, is a device for making dispositions of property. And no other system of law has for this purpose so flexible a tool. It is this that makes the trust unique.

* * * * *

The duties of the trustee are such as the creator of the trust may choose to impose; the interests of the beneficiaries are such as he may choose to confer upon them." *Scott on Trusts*, Sec. 1.

The Congress is aware of the law of trusts. Many sections of the Internal Revenue Code are devoted to trusts. We suggest that if Congress intended to tax "fiduciary powers",[1] i.e., "discretionary power to invade principal",[2] it would have said so in specific words and not by strained implication under the "legal or technical words"[3] "general power of appointment"—which it certainly is not.

Congress could have said:

"Sec. 2041½.

"*Fiduciary powers.* Where a fiduciary has discretionary power to invade a trust for the benefit of a life tenant, such trust shall be included in the gross estate of the life tenant."

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1 and 2 Finance Committee Report

3 **Strite v. McGinnes**, 330 F. 2d 234 (p. 20, Pet. for Cert.)

I will not attempt to compose a clause to include trusts where the discretionary power is to invade for the benefit of a widow *and/or* children. They are now collecting tax (by compromise) when the life tenant is only a widow.

The decedent was not a donor. She was co-trustee of Mary's and Katherine's estates. Here we have nieces and nephews who are willing to put up a fight. Many widows and children in the future will compromise in terrorem. Wills giving a trustee discretionary power to invade principal are common and advisable. Often the widow life tenant is co-trustee of her husband's estate. Such discretionary power, exercisable only if "necessary or advisable" is not *ascertainable*, and there is no reason it should be. Congress did not intend that "fiduciary power" *over some one else's property* should be taxable.

I think that unless certiorari is granted, many very able "average lawyers" will be embarrassed and many estates wrongly subjected to estate tax on property never at any time property of the decedent.

Respectfully submitted,

HENRY D. O'CONNOR,
Attorney for Petitioners.

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v.

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit as of No. 14,461.

Petition for Rehearing

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AS OF NO. 14,461.

PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

"There be three things which are too wonderful for me, yea four which I know not:"[1]

and now there are five. You allow certiorari (without a conflict between circuits) in a case involving single premium life/annuity contracts affecting a very small minority even of our wealthy population[2] and deny certiorari in the case at bar hitting the $25,000/$50,000 a year executive who wants to "take care of mother" against contingencies and emergencies—a recommended form of will drafting valid from time immemorial; a decision wreaking "havoc with invasion provisions generally."

This takes its place with the eagle in the air, the serpent on the rock, the ship in the sea, and the man with the maid.

We argue here for property rights. Many years ago we demonstrated our regard for human rights (successfully without need for petition for certiorari): *Commonwealth v. Valerio*, 118 Pa. Superior 34, 178 Atl. 509 (1935); *Comm. ex rel. Schultz v. Smith*, 139 Pa. Superior 357, 11 Atl. 2d 656 (1940).

Before Congress takes time to correct this perversion of its intent, many remaindermen—surviving children—will be mulcted.

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[1] **Proverbs**, XXX 18, 19.

[2] **Fidelity-Philadelphia Trust Co. (Haines Estate) v. Smith**, Collector, 356 U. S. 274, 78 S. Ct. 730 (1958). (Opinion by Mr. Chief Justice Warren.)

This is a case for certiorari.

Respectfully submitted,

HENRY D. O'CONNOR,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay; also, that this Petition is restricted to the grounds above specified.

HENRY D. O'CONNOR,
Attorney for Petitioners.